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### Geraint Thomas, Thomas on Powers

**Citation for published version:**

Valsan, R 2014, 'Geraint Thomas, Thomas on Powers' *Edinburgh Law Review*, vol. 18, no. 1, pp. 160-61.  
DOI: 10.3366/elr.2014.0194

**Digital Object Identifier (DOI):**

[10.3366/elr.2014.0194](https://doi.org/10.3366/elr.2014.0194)

**Link:**

[Link to publication record in Edinburgh Research Explorer](#)

**Document Version:**

Publisher's PDF, also known as Version of record

**Published In:**

Edinburgh Law Review

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One criticism of the book is the absence of a concluding chapter. Including such a chapter would have provided a valuable opportunity to draw together the complex and sophisticated arguments put forward in part one of the book, and to re-iterate the points where these arguments intersect with the doctrinal chapters. Notwithstanding this, *Manifest Madness* is a book of great merit. It is a thoroughly researched and engaging piece of work that successfully marries deep, theoretical and normative issues with detailed consideration of legal doctrine and procedure, an achievement that few scholars attempt let alone accomplish. Equally praiseworthy is the socio-historical dimension to Loughnan's research which, as Loughnan acknowledges, places her amongst a number of scholars, including Nicola Lacey, Lindsay Farmer and Alan Norrie, who have given prominence to this type of legal scholarship. Loughnan is to be congratulated for producing a book that strengthens this exciting field.

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EdinLR Vol 18 pp 160-161  
DOI: 10.3366/elr.2014.0194

### **Geraint Thomas, THOMAS ON POWERS**

Oxford: Oxford University Press ([www.oup.com](http://www.oup.com)), 2nd edn, 2012. cxxvii + 845 pp. ISBN 9780199539697. £235.

*Thomas on Powers* is a comprehensive study of the rules and principles governing the creation, exercise, and termination of powers in private law. Fourteen years after the first edition, *Powers* remains the only modern monograph dedicated to private law powers in common law. The current edition is an extensive update and expansion of the previous text. It covers all relevant judicial and legislative developments in English law, with references to cases in other common law jurisdictions, including many offshore jurisdictions. For the most part, Thomas maintains an excellent balance between details relevant to practitioners and underlying themes and parallels that are of interest for academic researchers. Indeed, in the Preface the author makes a strong case for the need to narrow the gap between the academic and the practitioner, by integrating abstract theory and law as practiced in the "real world".

Three chapters deserve special mention and will be reviewed in more depth. Chapter one sets the conceptual and terminological framework for the analysis of private law powers. This chapter is particularly significant for academic scholars, as it goes to the heart of the concept of power as a fundamental concept of private law. Thomas' definition of power is limited to powers over another's property: power is an authority or mandate conferred on, or reserved by, a person to deal with, as well as dispose of, property which he himself does not own. This is a suitable working definition for the intents and purposes of the book. From an academic perspective, however, it is very narrow, and it does not correspond entirely with the established use of the concept of power in analytical jurisprudence. Thomas does not engage with, or refer to, Hohfeld's definition of power. This is regrettable, since Hohfeld's taxonomy of fundamental private law concepts is adopted in virtually all contemporary discussions on the nature and content of legal rights, *lato sensu*.

Another relevant part of this chapter deals with the similarities between principles of judicial review in public law and principles of exercise of discretion in private law. Thomas has an ambivalent position in this respect. On the one hand, he outlines the extensive cross-fertilisation and close parallels existing between the principles applicable to the exercise of powers in public law and in private law. Moreover, the grounds on which the exercise of fiduciary powers may be challenged are remarkably similar to those laid down as the basis for judicial review in public law. On the other hand, he discards such parallels as superficial

and unhelpful for private law analysis. While it is not difficult to agree that a wholesale import into private law of these principles is inappropriate, it could be argued that Thomas dismisses the analogy too hastily. His comparison does not touch on a key common feature of the two sets of rules: the strictness of the no-conflict rule and the rationale behind it.

Chapter ten, dealing with the duties of donees of powers, is perhaps the most important part of the book. The depth and breadth of analysis are remarkable. Thomas focuses on the main duties owed by holders of fiduciary powers, but references are also made to donees of non-fiduciary powers, when appropriate. There are extensive discussions of duties of fiduciaries other than trustees, with parallels drawn between the two categories of fiduciaries. This chapter is an invaluable point of reference for both academics and practitioners. From an academic perspective, it is one of the very few texts that offer a systematic treatment of duties specific to fiduciaries, other than the no-conflict and no-profit duties. These duties tackle different aspects of the core feature of a fiduciary position, namely the exercise of judgment or discretion over another's interests. One section, in particular, sets this book apart from other texts on fiduciary duties: Section F, on the duty to take account of relevant considerations and to ignore irrelevant ones. This section is especially important as it discusses at great length the demise of the so-called 'rule in *Hastings-Bass*', in the light of the recent Court of Appeal joint decision in *Pitt v Holt* and *Futter v Futter* [2011] EWCA Civ 197. As a minor point, it is regrettable that the UK Supreme Court decision on appeal was not available by the time this book was published. This is largely inconsequential, however, since the Supreme Court shared the Court of Appeal's views on the fate of the *Hastings-Bass* rule.

Chapter twelve, on conflicts of interest, is another key part of the book. Thomas focuses on the application of the no-conflict rule in various contexts and on the exceptions to this rule, leaving the concept of conflict of interest only vaguely sketched. He describes this concept alternatively as an opposition between the power holder's and the objects' separate interests, or as a conflict between the power holder's interests and his duty or duties. This imprecise approach to conflicts of interest is pervasive in the fiduciary law literature and has contributed to the misunderstanding of the reasons for the particular strictness of the no-conflict rule. A more precise understanding of the notion of conflict of interest, which is gaining momentum among fiduciary law scholars, holds that the conflict occurs between the power holder's own interests and his fiduciary duty to exercise judgment based on relevant considerations.

The second edition of *Powers* consolidates the position of this book as an authoritative text in fiduciary law. Thomas follows in the footsteps of Edward Sugden or George Farwell, whose pioneering works on powers have dominated the topic over the past two centuries. It is hoped that the future editions will continue to strengthen this book's contribution to a coherent set of rules, principles and concepts of fiduciary law.

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EdinLR Vol 18 pp 161-163  
DOI: 10.3366/elr.2014.0195

**Richard Garnett, SUBSTANCE AND PROCEDURE IN PRIVATE INTERNATIONAL LAW**

Oxford: Oxford University Press ([www.oup.com](http://www.oup.com)), 2012. lxvi + 384 pp. ISBN 9780199532797. £120.

In English private international law practice, the basic distinction between substance and procedure leads to the application of different rules to the merits of the case and the conduct of